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No. 83-1386

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HON. RONALD A. LEGGETT,
Collector of Revenue in the City of St. Louis,
HON. PAUL M. BERRA,
Comptroller of the City of St. Louis
and
THE CITY OF ST. LOUIS,
Petitioners,

vs.

CRATON LIDDELL, etc., et al.,
Respondents.

BRIEF OF RESPONDENTS ST. LOUIS COUNTY, MISSOURI, COUNTY EXECUTIVE GENE McNARY, and COUNTY COLLECTOR GEORGE LEACHMAN IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

PARTIES

St. Louis County Government Defendants adopt the Petitioners' statement of questions presented and listing of parties.

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Comes now Respondents St. County, Missouri, a constitutional charter county of the State of Missouri, County Executive Gene McNary, and County Collector George Leachman (hereinafter "St. Louis County Government Defendants") and respectfully offer this brief in support of the petition of the Collector of Revenue in the City of St. Louis, Comptroller of the City of St. Louis, and the City of St. Louis, Missouri, for writ of certiorari to the United States Court of Appeals for the Eighth Circuit, to review its judgement entered on February 8, 1984, in this case, as modified by order dated March 5, 1984.

OPINIONS BELOW

JURISDICTION

St. Louis County Government Defendants adopt the statement of Opinions Below and Jurisdiction in Petitioners' petition.

STATEMENT OF THE CASE

St. Louis County Government Defendants agree with and adopt the Statement of the Case presented by the Petitioners, and offer the following statement for clarity.

St. Louis County, Missouri, is a constitutional charter county which does not contain the City of St. Louis within its boundaries. The City of St. Louis, Missouri, seceded from St. Louis County, Missouri, in 1875, and performs the function of both a city and a county. Thus, when Petitioners' brief states that the "Collector of Revenue, and independent elected *county* official not part of City government, must collect all taxes appearing on real and personal property tax bills and defends against all taxpayer protest actions and suits to enjoin collection" (Pet. 5, emphasis added), it is not meant that the Collector of Revenue is a St. Louis County official, but rather an official in St. Louis City performing "county" functions within the city. The word "county" is also used loosely throughout the opinions to refer to the county school districts (see, e.g., A-451 and A-408b), which are not part of St. Louis County Government. (All references are to Petitioners' Appendix.) By constitution, St. Louis County is precluded from exercising legislative power pertaining to school districts. Mo. Const. art. VI, Section 18(c). School districts in St. Louis County are separate political subdivisions of the State of Missouri. Mo. Const. art. X, Section 15.

A reading of the petitions in this case (see A-179 through A-230), and the settlement agreement which purports to settle the case (A-53 through A-144), shows that not all defendants are signatories and that not all issues are resolved. There remain charges relating to "housing" issues against "housing" defendants which are yet to be litigated. St. Louis County Government Defendants are concerned that they will be faced with federal courts who are bent toward assuming control over and dispersal of local tax monies upon the slightest provocation without any declaration of the law by this Court establishing the proper parameters, should any exist, for such action. State and local treasuries are now subject to judicial raids for judicial "programs."

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I. The Petition Should Be Granted Because This Court Needs To Definitively Resolve Whether Federal Judges Do In Fact Have The Authority To Tax By Judicial Fiat In The Name Of "Equity" To Effectuate What A Judge Believes To Be A Social Good To The Detriment Of Other Social Goods Without Regard To The Doctrine Of The Separation Of Powers Or The Will Of The People. If This Court Finds Such Authority Within The Increasing Weaponry Of A Federal Judge's Arsenal, This Court Needs To Definitively Resolve And Define The Parameters, Scope And Authority Of A Federal Judge To Impose Taxation Without Representation.

This is not a case where the law on judicial taxation is newly developing and should be allowed to ferment in the lower courts until it is ripe for Supreme Court action. The separation of powers spawned by arbitrary imposition of taxation was fundamental to the reasons our country was established, and cannot be easily distinguished out of existence by a result-oriented court bent on social engineering without regard to the nature and scope of the wrong to be redressed.

The scholarly and exhaustive brief of Petitioners Leggett, Berra, and the City of St. Louis requesting issuance of the writ of certiorari highlights and documents the misuse of precedent which court of appeals and the district court have used to justify their truly unprecedented exercise of powers never granted to the judiciary. The thorough treatment of petitioners will not be repeated by St. Louis County Government Defendants, who seek to emphasize the important nature and broader significance of the issues presented by Petitioners.

Review of cases of this Court easily convinces that all legal barriers for complete social reform by the judiciary do not crumble upon a finding of constitutional violations. Each branch of our federal government has its limitations. It is im-

perative that this Court acknowledge and define the limits of the federal judiciary in the area of taxation and acknowledge that the power to tax is not a power of the judiciary.

In *Palmer v. Thompson,* 403 U.S. 217 (1971), this Court explicitly acknowledged its inability to legislate new laws once a constitutional violation had been found. While it had been clearly illegal for Jackson, Mississippi to operate segregated swimming pools, only Congress possessed the broad constitutional power to order the affirmative steps requested in the absence of a present and continuing violation. This Court acknowledged that financial considerations could justify reducing governmental services to all persons, even where one race had received preferential treatment previously. There was nowhere even a hint that the federal judiciary could control Jackson's taxes to compensate for prior wrongs.

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964), supports the position of petitioners. In fashioning a remedy to compel defendant school district defendants to operate non-discriminatory schools, this Court carefully chose its language to reflect that the funding be provided by application of state law, which was not usurped by the Federal judiciary.

We have been separated by centuries from the degree of governmental oppression which gave birth to the form of federal government we now take for granted. This Court has refused to let that gap of time engender judicial apathy and carelessness in areas touching upon other precious rights, such as those guaranteed defendants in criminal cases. How ironic that the federal judiciary, guardian of fundamental rights upon which our country was founded, now is the proponent of changing the allocation of power between state and federal government and between the judiciary and the people.

This Court should grant the petition to give the serious, detached consideration to the legal and constitutional issues af-

fecting taxation which have yet to be thoughtfully analyzed and balanced in this case.

II. The Petition Should Be Granted Because There Are Significant Issues In Remaining Portions Of The Case To Be Decided Which Will Be Materially Contaminated By The Court Of Appeals' And District Court's Disregard For The Federal Rules Of Civil Procedure, Their Determination Of Liability Without Proper Findings Of Fact And The Court Of Appeals' Willingness To Disregard Its Own Legal Conclusions. All This Suggests That Supervision By This Court Is Required To Demand Fair Treatment Of All Parties.

To this point in this case, no order has been entered by any Court adjudicating any rights or liabilities with respect to St. Louis County Government Defendants nor requiring the county to perform or refrain from performing any act. However, dangerous precedent is being established which, if unchecked by this Court, could produce devastating procedural and substantive results against St. Louis County Government Defendants in remaining phases of this case as well as markedly changing the law of the land affecting defendants in future cases.

The momentum of this case, set by the district court and the court of appeals and not by the parties, has been toward implementing broad social reform which the court of appeals has found desirable without regard for the law regarding findings of liability.

As an example of this, the February 8, 1984, opinion of the Eighth Circuit, in its statement of facts, and on its face reflects the unusual character of the proceedings.

> "The district court entered an order on August 6, 1982, which disclosed the mandatory interdistrict plan it would impose in the event the suburban school districts were found liable for constitutional violations. This plan would create one unified metropolitan school district with a

> uniform tax rate. The court then scheduled interdistrict liability hearings."

(Appendix K, A-409). That the district court could formulate a remedy prior to determination of liability and still comply with the indisputable constitutional requirement that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation", *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) (Milliken I), *Dayton Bd. of Education v. Brinkman,* 433 U.S. 406 (1977), is, to defendants yet to be tried in this action, frightening. If the requirement of finding of fact for the tailoring of remedy can be satisfied when the remedy is determined first, it is hard to see why this Court has wasted so much judicial effort expounding on the requirements in cases such as *Milliken I* and *Brinkman.* The court of appeals here, however, found nothing unusual. For proper appellate concern for the necessity of fact-finding, see *Oliver v. Kalamazoo Bd. of Education,* 640 F.2d 782 (6th Cir. 1980), where the court of appeals refused to assume the facts establishing the extent of the violation or necessary scope of the remedy. Unlike this case, more than lip service was paid to the requirements of findings to support a court's conclusions.

The court of appeals in an unusual acknowledgement of the requirement of findings to support a judgment, as required by Rule 52, F.R.Civ.P., determined that the district court's order of July 5, 1983, enjoining the tax rollback due St. Louis City residents under state law "was deficient in that it was not accompanied by a factual finding by the district court that all other fiscal alternatives were unavailable or insufficient." (A-455) Surprisingly, however, the court of appeals felt it could "sustain the injunction against the rollback for the balance of this school year" for "equitable" reasons. St. Louis County Government Defendants, as defendants in the "housing" issues remaining before the district court, are faced with the precedent of possibly having to pay for admittedly unjustified "remedies" once a federal court invokes equitable considerations that places

plaintiffs in a superior position, though legally unjustifiable, to county's citizens.

It is one thing to be faced with a district judge who determines the remedy before the violation, but to be further confronted by an appellate court which does not limit itself to a reviewing function, but actively redefines the scope and even purpose of the lawsuit is another. An example of the restructuring of the litigation occassioned by the court of appeals can be found in its discussion of the objective of a major component of the settlement agreement. Although the court of appeals believed that "the objective of transfers between the city and county is the eradication of segregation within the city" (Appendix K, A-428) and therefore denied state funding for county-district to county-district transfers, that was clearly not the intent of the parties. The petitions filed by plaintiffs reflects their intent to pursue claims of discrimination in county school districts. (See, for example, Appendix F, A-197, paragraph 35.) The settlement agreement was intended to settle those claims also. (See introduction to settlement agreement, Appendix C, A-55). Parties are not only litigating against each other, but with the knowledge that regardless of what they do, the court of appeals will use the appellate review process to modify the result of the district court to achieve a result not sought by any party to the litigation. Because review by this Court is so difficult to obtain, the parties are essentially denied review by a detached, disinterested appellate court.

The record in this case, as discussed under this point, shows not only that questions regarding legal principles affecting taxation need to be addressed by this Court, but that the whole atmosphere of the proceedings below need to be analyzed to determine whether they are consistent, when viewed as a whole, with American concepts of due process and fairness.

CONCLUSION

If this Court refuses to intervene to demand that the lower courts obey substantive and procedural law, the message the court of appeals infers will be clear. Judicial taxation was initially imposed by this same court of appeals in *United States v. Missouri,* 515 F.2d 1365 (8th Cir. 1975), cert. denied, 423 U.S. 951 (1975). The court of appeals has in this case travelled further into areas previously off limits to the courts. A denial of certiorari again will be but another fact which "cannot be overlooked" (opinion of February 8, 1984, Appendix K, A-419, note 8) and will mislead the court of appeals into believing that judicial taxation is the law of the land as sanctioned by this Court. This, combined with the unusual procedure and atmosphere of the proceedings in the courts below, provides ample basis for this Court's granting of a writ of certiorari to study the issues more clearly.

Respectfully submitted,

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